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No. 01-729

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

GLENN G. GODFREY AND BRUCE M. BOTELHO, *Petitioners,*

v.

JOHN DOE I, JANE DOE, AND JOHN DOE II, *Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA EX REL. BILL LOCKYER, ATTORNEY GENERAL, AND THE STATE OF COLORADO EX REL. KEN SALAZAR, ATTORNEY GENERAL, AND THE 41 STATES AND TERRITORIES OF ALABAMA, ARIZONA, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA* AS AMICI CURIAE IN SUPPORT OF PETITIONER, THE STATE OF ALASKA

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QUESTION PRESENTED

Alaska's sex offender registration act requires convicted sex offenders to register with the Alaska Department of Public Safety and makes offender information available to the public. The department elected to publish the information on the Internet. This procedure raises the following question:

Does the statute, on its face or as implemented by the Department of Public Safety, impose punishment for purposes of the Ex Post Facto Clause of the United States Constitution?

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The Amici States file this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

INTEREST OF THE AMICI CURIAE

This brief is respectfully submitted in support of Petitioner, the State of Alaska, and urges reversal of *Doe v. Otte,* 259 F.3d 979 (9th Cir. 2001). In an opinion authored by Judge Reinhardt, the Ninth Circuit Court of Appeals held Alaska's sex offender registration and notification laws violated the Ex Post Facto Clause of the United States Constitution, reversing the decision of the Alaska district court.

All the states have a compelling interest in monitoring the whereabouts of convicted sex offenders, facilitating the investigation of sex crimes, and in disseminating information about registered sex offenders to protect the public. All 50 states require registration by sex offenders, and most have some form of community notification regarding sex offender registrants. Thirty states and the District of Columbia use the Internet to disseminate information about registered sex offenders, and one other state has authorized the creation of an

Internet website. Those states which do not place their sex offender registries on the Internet use a variety of other methods for notification, including making registries available at local law enforcement offices, personal notice, flyers, the news media, state-sponsored telephone lines, and mailed notices.

The states have a strong interest in preventing reoffense by convicted sex offenders, and in reducing the number of victims of sex crimes. The impact on society of sexual abuse is incalculable, its effects often devastating not only to the victim of the immediate crime, but to future generations.

SUMMARY OF ARGUMENT

The differences in the states' laws on sex offender registration and notification are not material for purposes of an ex post facto analysis. No state's law is so punitive in effect that it nullifies legislative intent that the laws constitute a regulatory scheme enacted for the protection of public safety. Although some states have chosen to place limits on the scope, extent and manner of sex offender notification, other states are not mandated by the federal Constitution to enact similar restrictions. The most important factor in the ex post facto analysis is the fact that the states' sex offender registration and notification laws were enacted to serve important nonpunitive goals, based on appropriate decisions by state legislatures balancing the interests of individual sex offenders with societal risks. Respondents cannot demonstrate by the clearest proof that sex offender registration or notification laws are punitive in either purpose or effect.

ARGUMENT

NO STATE'S LAW ON SEX OFFENDER REGISTRATION OR NOTIFICATION IS SO PUNITIVE IN EFFECT AS TO OVERRIDE LEGISLATIVE INTENT THAT THE LAWS BE REGULATORY

Over the past two decades, the states have confronted the danger of recidivism by sex offenders through the enactment of registration and notification laws. These laws vary in their scope, extent and manner. But all are directed to the remedial purpose of preventing future offenses by providing information to law enforcement agencies and the public. Typically, this is information that is already available to the public in different forms.

In our federal system, the states are afforded wide latitude in assessing the risk posed by prior offenders and in fashioning laws designed to provide for public safety. *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3, 117 S.Ct. 2072, 2081 n.3, 138 L.Ed.2d 501, ___ (1997). Deference to the states' exercise of their police powers is an integral part of the ex post facto analysis: a state's intent that an Act is civil can only be overcome by the clearest proof that the Act is punitive in purpose and effect. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). The enactment of these laws is well supported by studies that demonstrate significant levels of recidivism among sex offenders and reveal the secrecy and trauma that envelops victims of sexual assaults.

As set forth below, the states have crafted registration and notification laws to address the many facets of recidivism among sex offenders. Some states have chosen to impose greater constraints on their own governments than those required by the federal Constitution. This choice does not

compel other states to limit the scope of their registration and notification laws. All the states' laws fall within the broad latitude that is afforded the states in acting for the public safety.

This brief provides an overview of the registration and notification laws of the fifty states. It then sets forth the research that supports the enactment of these laws. Finally, it applies the ex post facto analysis articulated by this Court in *Kennedy* to the registration and notification laws. As set forth below, these laws are not punitive in purpose or effect, and do not violate the constitutional prohibition against ex post facto laws.

A. Overview Of State Sex Offender Registration Laws

Although California enacted its sex offender registration law in 1947, retroactive to 1944 (Cal.Stats. 1947, ch. 1124, § 1), the vast majority of states enacted such laws within the last 15 years, many after 1994 in order to comply with federal law (the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. 14071) which set out minimum standards for state compliance. Center for Sex Offender Management, *Sex Offender Registration: Policy Overview and Comprehensive Practices* (Oct. 1999) at p. 1 (hereinafter "CSOM, *Registration* "). (All CSOM publications cited herein are available at www.csom.org/pubs/sexreg.html.) Registration is intended to provide law enforcement with an investigative tool to identify possible suspects for unsolved sex offenses, and to enable law enforcement to locate such suspects.

State laws require sex offenders to register prior to or upon release from confinement, or when released on probation, and typically require that offenders be notified of the duty to register at sentencing or before release from confinement. CSOM, *Registration*, at 4. The information collected includes

the offender's name, address, fingerprints, and a law enforcement identification number, and 39 states also require a photograph as part of the registration process. CSOM, *Registration*, at 4. Some states also collect information on the registrant's physical description, date of birth, current employment, residence history, and vehicle registration numbers. Federal law also mandates that the states require sexually violent predators to provide "documentation of any treatment received for their mental abnormality or personality disorder." 42 U.S.C. 14071(b)(1)(B). However, this information is not made subject to public notification.

Most states require registrants to register for a minimum of 10 years, and in 1999 40 states required lifetime registration for specified sex offenders. Federal law now requires the states to mandate lifetime registration for sexually violent predators, aggravated and recidivist sex offenders. CSOM, *Registration*, at 5, *and see* 42 U.S.C. 14071(b)(6)(B)(i)-(ii). Some states allow designated offenders to petition for relief from the registration requirement after the 10-year period is completed. *See, e.g.*, Cal. Pen. Code, § 290.5; Or. Rev. Stat. § 181.600; 13 V.S.A. § 5411(c); Fla. Stat. § 775.21.

All the states require registrants to update their addresses at least annually, and federal law requires the states to mandate quarterly updates for sex offenders convicted of "aggravated" offenses. 42 U.S.C. 14071(b)(3)(B). Finally, most states (42) require the registration of some or all sex offenders convicted prior to the enactment of the state's registration law, but 17 apply the law retroactively only to those offenders who were incarcerated or under supervision at the time of the law's enactment. CSOM, *Registration* at 6-7. Some states' registries which predated the state's notification law contained significant numbers of registered sex offenders in the state, whose whereabouts were unknown to the public, and who would have remained unknown had the law been prospective only. For example, when its notification law was enacted in 1996, California had about 46,000 such offenders. 1998 Report

by California Department of Justice to the Legislature on California's Megan's Law, lodged herewith. Minnesota estimates it had 7,000 such offenders. State Survey by amici states of California and Colorado, lodged herewith [hereinafter "State Survey"].

Most states maintain a central sex offender registry. CSOM, *Registration* at 8. Local law enforcement or community supervision agencies receive the registration information from the registrant and forward it to the central registry. Bureau of Justice Statistics, *Summary of State Sex Offender Registry Dissemination Procedures* (1999) [available at www.ojp.usdoj.gov].

B. Overview Of State Sex Offender Notification Laws

Community notification laws vary more from state to state than sex offender registration laws. States vary in the procedures used for performing notification; the category of offenders subject to notification; the scope, form and content of notification; and the designation of agencies to perform notification. The state's sex offender notification laws can be divided into three categories: (1) broad community notification (19 states); (2) notification to those deemed at risk (14 states); and (3) passive notification, which requires citizens or community organizations to access sex offender information themselves (17 states). *Community Notification and Education,* April 2001, at 5 [hereinafter CSOM, *Notification*].

In states with broad community notification, law enforcement actively and widely releases information on designated sex offenders to the public. Some states define by statute the population subject to disclosure; others conduct risk assessments or rely on law enforcement agencies' discretion. In states notifying only those deemed "at risk," organizations typically notified are child care facilities, religious organizations, public and private schools, and other entities that

provide services to children or vulnerable populations. States allowing citizens access to sex offender information (passive notification) do so generally by making a central state registry public, although some require the citizen to be at risk from a specific offender in order to obtain access (defined by proximity to the offender's residence). CSOM, *Notification,* at 5.

Sex offenders are identified for notification in different ways. The majority of states specify by statute which sex offenders are subject to notification, and generally do not distinguish between high and low risk offenders. CSOM, *Notification,* at 6. This has also been referred to as the "compulsory" method of notification, utilized by 20 states without an individual determination of risk.[1] In a few states[2], law enforcement agencies determine when or who to notify about particular offenders. See, e.g., S.C. Code Ann. § 23-3-490; Or. Rev. Stat. § 181.592; Cal. Pen. Code § 290, subds. (m), (n). Finally, several states assess the individual risk posed by each sex offender: 12 states designate a state agency

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1. The 20 states utilizing this method are Alabama, Alaska, California, Connecticut, Delaware, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, and Virginia. *See* Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure,* 3 Buff. Crim. L.R. 593 (2000) [hereinafter cited as "Logan"]; research current as of October 1999; but note that the Second Circuit held the Connecticut law violated due process in *Doe v. Dept. of Public Safety,* 271 F.3d 38 (2d Cir. 2001), cert. granted on 5/20/02 in case number 01-1231; *and see* State Survey, lodged herewith.

2. Arizona, Hawaii, Maine, Nebraska, North Dakota, Washington, and Wisconsin direct law enforcement agencies to make classification decisions which determine the extent/scope of notification. Logan, supra note 1, at 610, fn. 76.

to assess risk by using a written risk assessment instrument, and six states require that a committee assess the offender's risk of recidivism. CSOM, *Notification,* at 6.

Of the states opting for risk-based assessments on individual sex offenders, six do not classify all sex offenders, but designate only sexually violent predators, either by review board (Colorado, Idaho, Georgia, Louisiana, North Carolina, and West Virginia) or by court determination (Florida). Logan, *supra* note 1, at 606, nn. 53, 54. Seven states allow law enforcement to make individual risk assessments. *See supra* note 2. Twelve states require a risk assessment of all sex offenders be done by entities other than law enforcement. Arkansas, Iowa, Massachusetts, Minnesota, Nevada, Oregon, Rhode Island, Texas and the District of Columbia utilize either a parole board, state Department of Corrections or special board to assess offenders; New Jersey uses a prosecutor-based assessment; Wyoming requires a judicial assessment; and in Montana and New York, courts make classification decisions based on initial assessments by experts who utilize risk assessment criteria and guidelines. Logan, *supra* note 1, at 612-616; State Survey, *supra* note 1. At least ten of the states utilizing individualized risk assessment allow sex offenders to contest decisions subjecting them to notification. CSOM, *Notification,* at 10.

Most states use one or more of the following methods of notification: Internet access, media release, door-to-door flyers, or mailed flyers. Approximately 30 states and the District of Columbia now operate Internet websites listing registered sex offenders, and Rhode Island has also passed a bill authorizing such a website.[3/] California, Florida, New York, and Wisconsin

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3. States with websites are Alabama, Alaska, Arizona, Connecticut, Colorado, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, New Jersey, New Mexico, Nebraska, New York, North Carolina, North Dakota, South

maintain "800" or "900" telephone lines that the public may call to inquire whether individuals are registered sex offenders. In California, a CD-ROM containing a list of registered sex offenders is available for public viewing throughout the state at local law enforcement offices. CSOM, *Notification,* at 7. Local law enforcement agencies in some states post lists of registered sex offenders in their jurisdictions on the Internet.[4/]

C. Research Supports The State Legislatures' Concerns About Sex Offender Recidivism

The *Otte* court held that Alaska's legislature did not intend its law to be punitive. Alaska recognized the problem of sex offender recidivism and addressed it by releasing information to the community. *Otte*, 259 F.3d at 986.

Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. Rhode Island recently passed a bill authorizing an Internet site. CSOM, *Notification* at 8; Summary of State Sex Offender Registries, 2001, www.ojp.usdoj.gov; *and see* http://www.klaaskids.org (last visited March 18, 2002.) Note that offenders convicted prior to the effective date of Alaska's act were removed from the website by the Ninth Circuit in this case; Connecticut's site was stayed by the Second Circuit in *Dept. of Public Safety v. Doe,* note 1; and restrictions on the information which could be placed on New Jersey's site were announced in *A.A. v. New Jersey,* 176 F. Supp.2d 274 (D. N.J. 2001), rw. pending, U.S. Court of Appeals, 3d Cir., case numbers 01-4363 and 01-4471 [address information, including city of residence, excluded from Internet website.]

4. CSOM, *Notification,* at 8; local websites exist in Idaho, Massachusetts, Missouri, New Hampshire, Ohio, Oklahoma, Oregon, Washington, and Wisconsin. Klaaskids.org, *supra* note 3; State Survey, *supra* note 1.

Similarly, other states have chosen to address the problem through registration and notification laws.

Studies confirm the severity of the problem. Approximately 500,000 rapes and sexual assaults are reported each year. However, 80% of sexual assaults go unreported. Perkins, *Criminal Victimization in the United States*, 1993, National Crime Victimization Survey Report (Bureau of Justice Statistics, U.S. Dep't of Justice[5] 1 1996); Bachman, *Violence Against Women: Estimates from the Redesigned Survey*, National Crime Victimization Survey (B.J.S., U.S.D.O.J., Aug. 1995); English, *The Containment Approach: An Aggressive Strategy for the Community Management of Adult Sex Offenders*, 4 Psychol. Pub. Pol'y & L. 218 n.1 (1998).

Sex offenders pose a substantial risk of reoffending. Rapists have a recidivism rate of 49.4% to 63.8%; child molesters have a recidivism rate of 42% to 72%.[6] 2 Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator*, 37 San Diego Law Review, 1057, 1072 n. 80 (2000); Prentky, *Recidivism Rates Among Child Molestors and Rapists: A Methodological Analysis*, 21 Law and Human Behavior 635 (1997); R. Karl Hanson, et al., *Long-Term Recidivism of Child Molesters*, 61 Consulting and Clinical Psychol. 646, 648 (1993); *Recidivism of Sex Offenders*, Center for Sex Offender Management (May 2001). Convicted sex offenders are 10.5 times more likely to be arrested for a rape

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5. Hereinafter, the "Bureau of Justice Statistics, U.S. Department of Justice" shall be referred to as "B.J.S., U.S. D.O.J."

6. Discrepancies between the recidivism rates are generally attributable to the methodological variables employed by researchers. Prentky, at 636. However, when the variables are reconciled, the statistics strongly support the conclusion that the rate of recidivism is higher than previous estimates. Comparet-Cassani at 1069-70.

than non-rapist offenders. Beck, *Recidivism of Prisoners Released in 1983* (B.J.S., U.S. D.O.J. 1997). Rapists commit an average of 5.2 rapes that go undetected, and child molesters have an average of 4.7 unreported victims.[7] 3 Groth, *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime and Delinquency 450 (1982).

The studies indicate that sex offenders pose a risk of reoffending throughout their lives. "Contrary to conventional wisdom, most reoffenses did not occur within the first several years." Prentky, at 652. The "decay process" for rapists and child molesters is relatively slow and steady; offenders reoffend as late as twenty-four years after release from incarceration. Comparet-Cassani, at 1072. In later years, the recidivism rate for child molesters actually increased. Prentky, at 651-653.

Most sexual assaults are committed by an offender who is known to the victim. A Justice Department study showed that only 18% of rapes and sexual assault and 9.9% of child molestations are committed by strangers. Greenfeld, *Child Victimizers: Violent Offenders and Their Victims* (B.J.S., U.S. D.O.J. March 1996). The majority of the sexual assaults are committed by friends or acquaintances (53%), someone with whom the victim was intimate (26%), or another relative (3%); child molestations are most often committed by an acquaintance (40.1%), parents (33.4%), other family members (12.5%), or a boyfriend or girlfriend (1%).

Contrary to popular perceptions, sex offenders do not necessarily commit only one type of offense. Offenders may "cross over" from one type of sexual offense to another. "[M]any rapists of adult women also rape children and . . . many exhibitionists are also voyeurs and, given the opportunity,

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7. The number of child molestation victims does not reflect the actual number of undetected assaults because "it is characteristic of child molesters to have repeated contact with the same victim over an extended period of time." Groth, at 453-454.

may progress to more aggressive behavior." English, at 223-224. For example of 561 male offenders studied, 51% assaulted multiple age groups, 20% assaulted both genders, and 23% of incest perpetrators also molested children outside the family. These 561 offenders victimized 195,407 individuals with crimes ranging from child rape to obscene phone calls. *Id.*

Sexual assault takes a heavy toll on its victims. The effects on victims are often brutal and long-lasting, and the period of recovery can be prolonged. English, at 221. Victims of childhood sexual assault often act out in school, disrupt classrooms, and may sexually involve other children in the school lavatory. These victims' lives are often encased in conspiracy and secrecy, and their families often suffer extreme emotional and financial burdens as a result of these assaults. Hindman, J. *Just Before Dawn* 4 (1989). "Thus, apart from the substantial personal trauma caused to the victims of such crimes, sexual crimes against children exact heavy social costs as well." *Doe v. Poritz,* 662 A.2d 367, 375 (N.J. 1995). "Considering the tremendous physical and psychological impact sex crimes have upon the victims as well as their harmful societal effects, concerns of recidivism certainly warrant legislatures' attention." *Femedeer v. Haun*, 227 F.3d 1244, 1253 (10th Cir. 2000).

D. Sex Offender Registration And Notification Laws Are Not Punitive In Intent Or Effect Under The United States Constitution

This Court observed in *Lambert* v. *California*, 355 U.S. 225, 229, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957), that sex offender registration has not traditionally or historically been regarded as punishment. It is safe to say that no state enacted its sex offender registration or notification law with the intent to impose additional punishment on the offender, as "punishment" was construed by this Court in *Collins v. Youngblood,* 497 U.S.

37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). Many states explicitly stated in their statutes that the purpose of enacting the registration and notification laws was for public protection and to facilitate law enforcement investigation and apprehension of sex offenders. See, e.g., Ala. Code, § 15-20-20.1; Or. Rev. Stat. § 181.602; Calif. Pen. Code § 290. Other states did not include express intent language in their statutes, but the legislative histories of the bills leave no doubt as to the concerns about sex offender recidivism and public safety which prompted the legislation. See, e.g., *People v. Adams,* 581 N.E.2d 637 (Ill. App. 1991); *Dean v. State*, 60 S.W.3d 217 (Tx.App. 2001); *State v. Pickens*, 558 N.W.2d 396, 398 (Iowa 1997).

Whether a statute is civil or criminal is a question of statutory interpretation. *Allen v. Illinois*, 478 U.S. 364, 368, 92 L.Ed.2d 296, 106 S.Ct. 2988 (1986). Nevertheless, the differences that exist between the states' registration and notification laws are not significant for purposes of an ex post facto analysis, since even those laws which have certain punitive aspects serve important nonpunitive goals. *See Moore v. Avoyelles Corr. Ctr.*, 253 F.3d 870, 873 (5th Cir. 2001) [held, Louisiana's notification law does not violate the Ex Post Facto Clause].

This Court explained in *Collins* that the Ex Post Facto Clause does not prohibit retroactive application of every change which alters the situation of a party to his disadvantage. *Collins*, 497 U.S. at 50; *and see Calif. Dept. of Corrections v. Morales,* 514 U.S. 499, 131 L.Ed.2d 588, 115 S.Ct. 1597 (1995). The only relevant category in determining whether it is ex post facto to apply sex offender registration and notification laws to sex offenders convicted before the operative date of such laws is whether they "change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull,* 3 U.S. 386, 390 (1798). "After *Collins,* the focus of the ex post facto inquiry is not whether a legislative change produces some ambiguous sort of 'disadvantage'...but on whether any such change alters the

definition of criminal conduct or increases the penalty by which the crime is punishable." *Morales,* 514 U.S. at 506. Since civil commitment of dangerous sex offenders has been held not to "affix culpability for prior criminal conduct" (*Kansas v. Hendricks,* 521 U.S. at 362), it is patent that regulatory statutes, intended to register sex offenders and notify the public about such offenders living freely in the community, do not increase the penalty for the underlying sex offense.

In *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-169, this Court looked beyond the intent of the challenged law to determine whether the statutory scheme was so punitive in either purpose or effect to transform what was clearly intended to be a civil remedy into a criminal penalty. Factors were whether: (1) the sanction involved an affirmative disability or restraint; (2) it had historically been regarded as a punishment; (3) it came into play only on a finding of scienter; (4) its operation promoted the traditional aims of punishment--retribution and deterrence; (5) the behavior to which it applied was already a crime; (6) an alternative purpose to which it may rationally be connected was assignable for it; (7) it appeared excessive in relation to the alternative purpose assigned. This Court later observed, however, that these factors are neither exhaustive nor dispositive (*United States v. Ward,* 448 U.S. 242, 249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)), and in fact may be expected to conflict. *Hudson v. U.S.,* 522 U.S. 93, 101, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997).

The most important question under the intent-effects analysis is whether the law serves significant nonpunitive goals. *United States v. Ursery,* 518 U.S. 267, 290, 116 S.Ct. 1235, 135 L.Ed.2d 549 (1996). Amici submit that more weight should be given to this factor than any other. In fact, "the clearest proof is required to override legislative intent and conclude that an Act denominated civil is punitive in purpose and effect." *Kennedy,* 372 U.S. at 169; *Flemming v. Nestor*, 363 U.S. 603, 617, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960).

In *Hudson,* this Court criticized its earlier opinion in

United States v. *Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989), because it bypassed the question of whether a subsequently imposed penalty was criminal, and elevated one factor of *Kennedy,* i.e., whether the sanction was so grossly disproportionate to the harm caused as to constitute "punishment," to dispositive status. *Hudson,* 522 U.S. at 101. This Court also assigned error in *Halper's* assessment of the "character of the actual sanction imposed," 490 U.S. at 447, finding the Court should have evaluated the statute on its face to determine whether it provided for what amounted to a criminal sanction.

No state sex offender registration or notification law is intended to additionally punish the sex offender for the underlying crime, nor do such laws create criminal sanctions on their face. The effects of such laws, which Respondents contend render them punitive, cannot overcome the important nonpunitive purposes for which they were enacted. The Ninth Circuit erred by placing disproportionate weight on the same factor that this Court criticized in its earlier opinion in *Halper* for elevating to dispositive status.

1. Registration And Notification Do Not Create An Affirmative Disability Or Restraint

Sex offender registration/notification laws do not create an affirmative disability or restraint even if they make it difficult for individual registrants to obtain housing or employment, or subject some offenders to embarrassment or even vigilante action. Such statutes are regulatory, having no retributive purpose, but rather the legitimate nonpunitive purpose of ascertaining the whereabouts of those convicted of enumerated offenses.

This Court held that debarment from the banking profession did not render a civil sanction punitive or constitute an affirmative disability or restraint in *Hudson*, 522 U.S. at 102,

because it was "certainly nothing approaching the 'infamous punishment' of imprisonment." If debarment from an entire profession did not render a sanction punitive, then unauthorized discrimination in employment or housing by private persons against registrants does not create an affirmative disability or restraint. The means of accomplishing the regulatory purpose are not excessive.

The universal requirement of annual verification of addresses, and quarterly verification for those convicted of aggravated sex offenses, is not overly burdensome and is directly related to the public safety purpose of the law. Requiring quarterly registration for certain offenders and long-term, even lifetime, registration is also supported by research on recidivism. Research indicates that immediately prior to committing an offense, recidivists' compliance with treatment and other requirements deteriorates. They tend to miss more and more appointments. Hanson, *Dynamic Predictors of Sexual Recidivism* 1998-1, Solicitor General of Canada 22 (1998).[8/] Logically, the failure to comply with registration requirements may indicate that an offender's risk of reoffending has increased. Quarterly, as opposed to annual, registration provides law enforcement with immediate notice that an offender is not complying with registration. This permits law enforcement to locate the offender and assure such compliance.

Whether individual registrants may encounter difficulty in obtaining housing or employment, or even suffer illegal vigilante action (an uncommon event), is not relevant to an analysis of whether the law is punitive. In any event, vigilante actions have been infrequent. "The fact that violent incidents have been relatively rare may seem surprising given the media attention to these events." CSOM, *Notification,* at 13;

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8. This article may be found at www.sgc.gc.ca/epub/corr/e1998011b/199801b.htm.

and see E.B. v. Verniero, 119 F.3d 1077, 1089-1090, 1104 (3d Cir. 1997) [vigilante action "relatively rare"]. Just as actual conditions of confinement cannot divest a facially valid statute of its civil label *(Seling v. Young,* 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001)), the unintended effect on an individual of a facially civil law, validly enacted for a public welfare purpose, cannot render it punitive. In fact, for citizens who are not in the custody of the state, the right to personal security does not include the right to state protection from private violence. *See DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).

The *Otte* court found that the sex offender's duty to provide personal information, and the dissemination of address and employer information, contributed to creating an affirmative disability. The information required, however, is no more than necessary for effective public protection. The dissemination of address information is not the disclosure of intimately personal data which implicates the Constitution's right to privacy.[9/] If the

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9. While in many states rap sheets are not readily available, such rules merely reflects a policy judgment about the appropriate balance between the defendant's interest in getting a new start and the interest of others who might find criminal history information relevant to their decision making. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764-65, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989) (noting federal and state statutory and regulatory limitations on access to rap sheets). It does not reflect a general understanding that the dissemination of criminal history information by the government is additional punishment. The protection accorded by this Court to rap sheets in *Reporters Committee* reflected Congressional policy, not federal Constitutional law. The federal government and the states have today made different policy decisions when it comes to the criminal history of registered sex offenders, which they were entitled to make.

names of rape victims and juvenile offenders can be published, then a convicted sex offender should not be accorded a greater right to privacy. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) ["ascertaining and publishing the contents of public records are simply not within the reach of these kinds of privacy actions...."]; *Smith v. Daily Mail*, 443 U.S. 97, 61 L.Ed.2d 399, 99 S.Ct. 2667 (1979) [names of juvenile offenders not protected by Constitutional right to privacy from publication]. The right to privacy under the United States Constitution has been interpreted to apply to personal decisions involving marriage, procreation, contraception, family relationships, and child rearing and education. *Carey v. Population Services, Intern.*, 431 U.S. 678, 684-685, 52 L.Ed.2d 675, 97 S.Ct. 2010 (1977); *Planned Parenthood v. Casey,* 505 U.S. 833, 848, 120 L.Ed.2d 674, 112 S.Ct. 2791 (1992). ". . .Liberty implies the absence of arbitrary restraint, and not immunity from reasonable regulations and prohibitions imposed in the interests of the community." 16A Am. Jur.2d, Constitutional Law § 563, at 584.

Today anyone can very likely locate, via the Internet, the address of any American they wish to find. For example, the address of any person owning real property in America can be obtained, even if his address is unlisted in the local telephone directory. Such websites as ussearch.com; google.com; anywho.com; dogpile.com; classmates.com; docusearch.com; and discreetresearch.com provide both free and paid information disclosing not just addresses and employment information, but a host of more potentially embarrassing information, such as paternity information, bankruptcies, divorces, lawsuits, and credit history.

It is crucial to ensuring public safety that sex offenders not remain anonymous. The general knowledge that registered sex offenders lived in their city would not have alerted the parents of Megan Kanka to the fact that a twice-convicted pedophile and two other convicted sex offenders resided just across the street. *See* CSOM,

Notification, at 3; *E.B. v. Verniero,* 119 F.3d at 1081. Neither could the general information available in California on registered sex offenders have alerted the parents of young Michael Lyons, killed after kidnap, sodomy and torture, that a convicted pedophile was employed at a business across the street from their home. *People v. Rhoades,* No. 98F00230 (Sacramento Sup. Ct.; automatic appeal pending).

Some sex offenders support community notification laws, stating that local knowledge of their past offenses helps in their effort to remain free of future offenses. *See* www.calsexoffenders.net, a website by a convicted California sex offender who states that while registration and notification laws "may be burdensome,. . . they help us remember who we've been so we don't become it again." The states have a compelling interest in providing the public with specific information on the whereabouts of registered sex offenders.

Court decisions can be found on the Internet, as can most major newspapers and other news publications. Internet research would probably reveal the names of most registered sex offenders today. While the Internet disseminates information worldwide, it is unlikely that persons living outside the area will have an interest in checking on the location of registered sex offenders in a certain jurisdiction. For those who need to know, the Internet is by far the most effective means of obtaining such knowledge. Before being shut down by the federal district court, the Connecticut website listing registered sex offenders received over three million "hits" in four and a half months. *Doe v. Dept. of Public Safety,* 271 F.3d at 44, n. 14. Efficiency in the delivery of information important to public safety should not be the excuse for its suppression. Additionally, websites can be updated immediately, so changes in registrants' status and whereabouts can be made in real time, helping ensure the accuracy of the sex offender registries. Since there is no right to privacy with respect to one's criminal record, the ease of public access to that record should not be construed to create an affirmative disability or restraint. *See Whalen v.*

Roe, 429 U.S. 589, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977); *Paul v. Davis*, 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976).

The Ninth Circuit also found that extending the registration period for failure to register created an affirmative disability. While a few states extend the registration period when the offender is subsequently convicted for failure to register (see, e.g., 730 ILCS 150/10; Minn. Stat. § 243.166, subd. 6), the states can legitimately base the extension on the conclusion that an offender who wishes to hide his status and whereabouts is at a greater risk to reoffend than other offenders who have consistently complied with the registration law, and that a longer period of public disclosure is appropriate. Those states which do not permit judicial determinations of rehabilitation to relieve registrants of the registration duty are likewise entitled to legislatively determine that such a law is necessary for public safety, in that judicial assessment of rehabilitation is particularly difficult as to sex offenders. Neither is the sometimes lifetime registration obligation indicative of punitive intent, because the length of registration is directly related to a public safety purpose, based on studies showing recidivism risk for sex offenders persists over many years.

Finally, the Ninth Circuit criticized the Alaska requirement of lifetime registration for those convicted of "aggravated" sex offenses, finding that the lack of an individual determination of the risk of reoffense as to each offender created an affirmative disability or restraint under *Kennedy*. However, the states are not constitutionally mandated to enact registration or notification laws requiring individual assessments of risk. States must legislate in many areas based on general information regarding societal risk, e.g., revocation of drivers' licenses after drunk driving convictions. As this Court noted in *Hendricks*, the indefinite duration of civil confinement of sexually violent predators was not indicative of punitive intent because the length of confinement was linked to the purpose of commitment, just as lifetime sex offender registration and

notification are linked to the purpose of the registration and notification laws.

Some states' registration and notification laws base the length of registration and type of notification on the nature of the underlying sex offense. Others require additional factors to increase the frequency of registration or the level of community notification. The *Otte* court held that the Alaska Act was punitive because, among other things, it provides no opportunity for a registrant to prove that he no longer poses a risk of reoffending. *Otte*, 259 F.3d at 993-994. However, the Alaska legislature's determination that prior convictions were a sufficient indicator of future risk is entitled to substantial deference.

In assessing whether prior convictions indicate a sufficient risk of future dangerousness, legislatures are afforded the widest latitude in drafting statutes. *Hendricks*, 521 U.S. at 360. The studies cited above demonstrate that convicted sex offenders pose a significant risk of reoffending. Moreover, it is a risk that may not materialize in a criminal act for more than twenty years after the offender was released from custody. While the risk posed by sex offenders might be further delineated through psychological evaluations and evidentiary hearings, a legislature may reasonably conclude that a conviction for a sex offense is a good indicator of dangerousness.

Given the supporting studies, a legislature's determination that a prior conviction would support registration is a decision well within its authority. "The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness." *Jones v. United States*, 463 U.S. 354, 364, 103 S.Ct. 3043, 3049, 77 L.Ed.2d 694 (1983); *Hendricks*, 521 U.S. at 358, 117 S.Ct. at 2080 ("[p]revious instances of violent behavior are an important indicator of future violent tendencies"), *quoting Heller v. Doe*, 509 U.S. 312, 323, 113 S.Ct. 2637, 2644, 125 L.Ed.2d 257 (1993). Imposing reasonable limitations on the conduct of

convicted felons based on their convictions is well within the legislature's prerogative, particularly where this determination is supported by significant statistical research. *De Veau v. Braisted*, 363 U.S. 144, 158-160, 80 S.Ct. 1146, 1153-54, 4 L.Ed.2d 1109 (1960).

The fact that some states choose to do individual risk assessments, or are compelled by state constitutional law to conduct such assessments, does not mean that the federal Constitution requires all the states to enact similar laws. In fact, "[o]ne of the most consistent predictors of recidivism has been a history of prior convictions for sexual offenses. . . ." R. Karl Hanson, et al., "Long-Term Recidivism of Child Molesters", 61 J. of Consulting and Clinical Psychology 646. Individual risk assessment may not necessarily be more predictive of the risk of recidivism, because the validity of risk assessment as to a particular individual may often be uncertain. *See* Randy K. Otto, On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretation of the "Dangerousness" Literature, 18 Law & Psychol. Rev. 43, 45, 62-63 (1994) (noting that researchers in the 1970s began compiling data showing that the presumption that professionals could predict individual violent behavior was incorrect, but also noting that recent data showed "some" predictive ability).

2. Sex Offender Registration And Notification Have Not Historically Been Considered Punitive

The second *Kennedy* factor does not support a finding that sex offender registration and notification statutes are punitive, since sex offender registration has never been historically regarded as punishment (*Lambert*, 355 U.S. at 229), and neither have statutes which disclose criminal conviction records to the public been regarded as punitive, since nondisclosure of one's criminal record is not one of those

personal rights which is "fundamental" or "implicit in the concept of ordered liberty." *Whalen v. Roe*, 429 U.S. 589; *Paul v. Davis*, 424 U.S. 693.

3. Scienter Is Not Implicated In Registration Or Notification Laws

The third *Kennedy* factor, scienter (372 U.S. at 168), is not implicated, because the states' registration and notification statutes are triggered simply by the offender's arrival and residence in a community. Although the Ninth Circuit found that scienter was requisite under the Alaska law because the law did not address registration by those found not guilty by reason of insanity, the fact that a particular legislature has chosen not to regulate all classes of offenders (such as the criminally insane) is irrelevant to the scienter issue. No particular intention on the part of the sex offender registrant is involved or relevant to registration, because registration and notification commence based solely on conviction for a designated sex offense. As noted by this Court in *Hudson*, no scienter was required by the sanction imposed on those who violated the banking statute because the sanction applied without regard to the violator's state of mind. An earlier Ninth Circuit panel noted that the crime of **failing** to register as a sex offender constitutes a separate offense, and the fact that a prior sex offense conviction is an element of the "failure to register" offense is of no consequence to the scienter determination. *Russell v. Gregoire*, 124 F.3d 1079, 1088-1089 (9th Cir. 1997).

4. Registration And Notification Are Not Retributive, Although They May Prevent Future Sex Crimes

The fourth *Kennedy* factor is whether the statute

promotes the traditional aims of punishment, retribution and deterrence. Sex offender registration and notification laws do not inflict retribution because they neither label the offender as more culpable than before (though his culpability may be more widely publicized), nor do they turn on a finding of scienter. *Russell,* 124 F.3d at 1091. However, registration and notification may prevent future sex offenses. Studies at this point are not conclusive because the laws are so new, but preliminary research indicates that recidivism by Minnesota sex offenders released after notification began may be significantly reduced compared to recidivism by sex offenders released in 1992, prior to the enactment of Minnesota's notification law. State Survey, *supra* note 1. Even if such laws have a deterrent effect, it should not negate the overall remedial or regulatory nature of the statutes, since their objective is in fact to protect innocents and prevent future offenses, by allowing potential victims access to the truth. This Court has said that protecting the public and preventing crimes are the types of purposes it has found regulatory and not punitive. *DeVeau v. Braisted*, 363 U.S. at 160. *Ursery* declared that deterrence can serve both civil and criminal goals, and noted that the fact that a sanction may be tied to criminal activity alone is insufficient to render the sanction punitive. *Ursery*, 518 U.S. at 292; *see Hendricks*, 521 U.S. at 361-362.

The *Otte* court held that the Alaska statute was retributive because it tied the length of the reporting period to the "extent of the wrongdoing, not...[to] the extent of the risk posed." *Otte*, at 990. However, a legislature might reasonably determine that an offender who poses a risk of greater harm ought to register for a longer period that one who poses an equal risk of lesser harm.[10/]

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10. The example relied upon in *Otte* – comparing an offense involving a victim under thirteen years old (that requires longer registration) with an offense involving a victim between thirteen and fifteen years old (that requires shorter registration) – does not necessarily support a determination that the registration required turns on the level of wrongdoing. The distinction between the two offenses may be that the first one is deemed to involve a child molester. The risk of sexual abuse of children under thirteen years of age is greater than the risk for children over thirteen. *See Greenfeld*, at 2. And child molesters pose a greater risk of reoffending than rapists. Prentky, at 651-653.

Additionally, as the Prentky and other studies show, long-term registration serves the remedial interest of public safety because sex offenders are at risk to reoffend for their entire lives. According to Prentky, the failure rate for child molesters actually increases more than ten years after the offender has been released from custody. Prentky, 651-653. The *Otte* court's conclusion that an offender's risk of reoffending may subside is not borne out by the research.[11/]

While prior convictions trigger the duty to register, this does not mean that registration is punishment for the conviction. It is the underlying sex offense, proved beyond a reasonable doubt in the criminal action, that supports imposing the duty to register. *Jones*, 463 U.S. at 364. Nevertheless, the *Otte* court found that simply because the Alaska statute required registration by convicted sex offenders, it applied to criminal behavior and concomitantly favored a finding that the statute was punitive. *Otte*, 259 F.3d at 991.

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11. In assessing the excessiveness prong of the *Kennedy* test, the *Otte* court has interjected a due process analysis into the ex post facto analysis. The court held that there must be a procedure available to determine the level of risk before an offender is subjected to the registration-notification requirements of the Alaska Act. The focus should be on the statutory "sanctions" in assessing excessiveness. Cf. *Femedeer:* Internet notification not excessive in light of interests at stake: prevention, avoidance, and investigation.

The *Otte* court distinguished the Alaska statute from a Utah statute reviewed in *Femedeer*, 227 F.3d 1244. The Utah statute required registration by those who were civilly committed and those who were convicted of a sex offense. The *Otte* court held that it was the inclusion of those subject to civil commitment that made the Utah law non-punitive under this prong of the *Kennedy* test, unlike the Alaska law. However, a state might well determine that its civil commitment laws adequately protect society from those who have been committed.

In assessing this prong of the *Kennedy* test, Alaska's declared purpose of providing public safety from sex offenders should be given deference. The decision of Alaska, and other states, to rely on the underlying criminal determination in determining who is subject to registration and/or notification does not conflict with the remedial purpose. In some circumstances, the reliance on a criminal conviction is an important element of distinguishing criminal from civil statutes. Here, prior criminal conduct is considered, "Not to punish past misdeeds, but primarily ... to predict future dangerousness." *Hendricks*, 521 U.S at 362, 117 S.Ct. at 2082.

5. An Alternative Purpose Exists For These Regulatory Laws, And The Laws Are Not Excessive With Respect To The Public Safety Purpose Assigned

The fifth and sixth factors considered in *Kennedy* are whether the behavior triggering the regulatory measures was criminal (yes), and whether an alternative purpose is assignable to the regulatory measures the states have undertaken (yes: public safety and facilitation of law enforcement investigation of sex crimes). The seventh factor, whether the regulatory measure appears excessive in relation to the alternative purpose assigned, was overly weighted by the Ninth Circuit in analyzing

the Alaska law. Other regulatory sanctions have had harsh effects similar to the community's possible response to notification about sex offenders, and have been upheld. *See De Veau*, 363 U.S. 144 (forbidding work as a union official); *Hawker v. New York*, 170U.S. 189, 42 L. Ed. 1002, 18 S. Ct. 573 (1898) (revocation of a medical license); *Mahler v. Eby*, 264 U.S. 32, 68 L. Ed. 549, 44 S. Ct. 283 (1924) (deportation); *Flemming*, 363 U.S. 603 (termination of Social Security benefits)). Moreover, "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.'" *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 777, n. 14, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994).

The state legislatures legitimately enacted sex offender registration and notification laws based on two premises: (1) that the long-term effects on victims who are sexually assaulted have become a serious societal problem, and (2) that sex offender recidivism is a significant concern. The registration of sex offenders, and notice to the public of their status and whereabouts, directly serves the state goals of reducing sexual assault by facilitating investigations of sex crimes and preventing recidivism.

The following examples of the effectiveness of notification law were taken from the California Department of Justice's Reports to the California Legislature[12/] on California's Megan's Law: (1) A woman viewing the state's sex offender registry on a CD-ROM at a law enforcement agency recognized a high-risk offender as a man who had been involved with a local Little League for years. She knew he did not live in the zip code area listed as his residence area. She notified local law enforcement, and investigation revealed he was in violation of the registration law and had molested at least eight boys. 1998 Report. (2) A CD-ROM viewer recognized a serious sex

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12. Mandated by Cal.Pen. Code § 290.4, subd. (m), the reports are lodged with this Court.

offender with prior child molestation convictions as a bus driver who transported disabled children. After investigation, the driver was charged with molesting two disabled children. 1998 Report. (3) A CD-ROM viewer recognized a neighbor, a serious sex offender, who had befriended her son. After investigation, the offender was subsequently arrested for molesting the viewer's son. (4) Police distributed a flyer identifying a person as a high-risk sex offender. When the offender attempted to lure a 14-year-old girl into his car, asking her for directions, she recognized him from the flyer and refused the ride. The offender was arrested for violating parole by having contact with a minor. 1998 Report. (5) Viewing the CD-ROM, a mother recognized her live-in boyfriend, who was listed as a registered child molester. She asked him to move out to protect her children. 2000 Report. (6) Viewing the CD-ROM, a day care operator saw that a neighbor of the day care center was a high-risk sex offender, and notified her employees. An employee later saw the offender expose himself near the center. Surveillance by law enforcement resulted in the offender's arrest for indecent exposure and sex offenses in two other counties. 2001 Report. (7) After local law enforcement distributed a flyer on a serious offender, neighbors recognized the offender, who had befriended local children, and discovered he had been taking them to a nearby wood for sex. He was convicted of sexually abusing three children. 2001 Report.

An example of the registration law fulfilling its purpose was the case of *People v. Guadalupe DeLeon* (No. F017947, Cal. App. 1993), in which a registered sex offender with a prior rape conviction committed a series of increasingly violent sexual assaults upon women asleep in their homes at night. In the final assault, the defendant knocked out the victim's teeth, cutting his hand and leaving his own blood at the scene. His rare blood type matched the blood type of one registered sex offender in the county, and subsequent investigation proved he was the serial rapist.

American society is no longer the village model in

which all those in the district are aware of the history of every individual member of the local population. In our largely urban, mobile world, it was easy for sex offenders to remain anonymous before the enactment of sex offender notification laws. While some argue anonymity is their right, hiding the past may facilitate and even enable offenders to perpetrate new sex offenses. This Court should give significant weight to the fact that the registration and notification laws were enacted to serve important nonpunitive goals, based on appropriate decisions by state legislatures balancing the interests of individual sex offenders with societal risks. Amici submit that Respondents have not demonstrated by the clearest proof that either of Alaska's registration or notification laws is punitive in purpose or effect.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the decision of the Ninth Circuit Court of Appeals be reversed.

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